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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 552

EMORY S. LAND, ET AL., Former Members of the United States Maritime Commission, and CHARLES SAWYER, Secretary of Commerce, PETITIONERS

v.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR CO., and H. M. LORBER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Charles Sawyer, Secretary of Commerce, and on behalf of Emory S. Land and other former members of the

United States Maritime Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on January 31, 1951.

OPINIONS BELOW

The opinion of the district court on the merits (R. in No. 353, at 258-275) is reported at 82 F. Supp. 919. The opinion of the court of appeals on the merits (R. in No. 353, at 2144-2158) is reported at 184 F. 2d 245. The memorandum opinion of the district court on stay of execution (Tr. 2246; Supp. R. 57) is not reported. The opinion of the court of appeals on the form of judgment (R. 42-47) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1951 (R. 46). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Respondents brought suit to compel members of the Maritime Commission to turn over to them the controlling stock of a steamship line, alleged by respondents to have been pledged rather than transferred outright to the Commission in 1938. The court below held the transfer to be a pledge and, on appeal from the final judgment entered upon its mandate, that the judgment was enforceable to give respondents possession of the stock

against the defendants, who no longer are connected with the Commission or its successor agency, and against the Secretary of Commerce, who is not a party to the action.[1] The questions here presented are:

1. Whether the immunity of the United States from suit may be avoided by permitting a judgment entered against former Government officials as personal tort-feasors to be enforced, under Rules 70 and 71 of the Federal Rules of Civil Procedure, against a Government official who holds the stock solely as agent for the United States, under Reorganization Plan No. 21 of 1950 and the specific direction of the President, and pursuant to the United States' claim of title, which has not been litigated.

2. Whether judgment for possession may be entered against former Government officials, although they are now out of office and could not possibly obey the judgment.

3. Whether the Secretary of Commerce, who appeared specially to protest the entry of a judgment affecting the interests of the United States in the property, has standing to appeal without submitting himself to the jurisdiction of the district court.

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[1] There has been filed with this petition a petition for rehearing of this Court's denial of a petition for writ of certiorari to bring up the decision of the court below on the merits. No. 353, October Term, 1950.

4. Whether Section 207 of the Merchant Marine Act of 1936 authorizes the Maritime Administration to acquire title to the transferred stock.

STATUTE AND RULES INVOLVED

The relevant provision of Section 207 of the Merchant Marine Act of 1936, as amended, 49 Stat. 1985, 46 U.S.C. 1101, *et seq.*, and the provisions of F.R.C.P. 65(d), 70, and 71 are set forth in the Appendix, *infra,* pp. 21-23.

STATEMENT

Respondents brought this suit on November 6, 1945, to recover from the then members of the Maritime Commission those shares of the common stock of the American President Lines (formerly Dollar of Delaware) which they had transferred to the Commission pursuant to an "Adjustment Agreement of August 15, 1938." Their major contention was that the stock had been pledged, that the underlying debt had been paid off, and they were, therefore, entitled to return of the stock. The defendant's contention was that the suit was an unconsented one against the United States, and, on the merits, that title to the stock had been transferred outright to the United States, acting through the Maritime Commission, and the 1938 agreement was not one of pledge. For a full statement of the facts, see the Petition for a Writ of Certiorari in No. 353, this Term, at pp. 3-11, 20-25, and the accompanying Petition for Rehearing in No. 353, at pp. 10-18.

The suit was originally dismissed by the district court for want of jurisdiction, as a suit against the United States. The Court of Appeals for the District of Columbia Circuit reversed. 154 F. 2d 307. This Court affirmed, stating that the members of the Maritime Commission would be individual tort-feasors if the Commission (a) had no authority to acquire the stock, or (b) had taken it as a pledge. 330 U.S. 731.[2] The district court, after a lengthy trial, ruled both issues against the respondents (R. in No. 353, at 258-275). 82 F. Supp. 919. The court of appeals reversed, holding that it was unnecessary to decide whether the Commission had authority to acquire the stock, because the transaction should be viewed as one of pledge rather than sale (R. in No. 353, at 2144-2158). 184 F. 2d 245. This Court denied certiorari last November. No. 353, this Term; 340 U.S. 884.

On May 24, 1950, Reorganization Plan No. 21 of 1950.[3] became effective. Under Sections 204, 305 and 306 of that plan, the Maritime Commission was abolished, its functions were transferred to the Secretary of Commerce, and its property and records were transferred to the Department of Commerce. In connection with the petition for

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[2] In *Larson* v. *Domestic and Foreign Commerce Corporation*, 337 U.S. 682, this Court explained its *Dollar* decision as based on the ground that the members of the Commission "acted in excess of their authority as public officers." 337 U.S. at 702, note 26.

[3] 15 F. R. 3178, following 5 U.S.C.A. 1333-15.

a writ of certiorari in No. 353, the Solicitor General in this Court moved to substitute the Secretary of Commerce as party defendant, pursuant to Section 9(b) of the Reorganization Act of 1949 (63 Stat. 203, 5 U.S.C., Supp. III, 133z.7(b)). Respondents opposed. This Court did not act on the motion. No. 353, this Term.

After this Court's denial of certiorari, the mandate of the court of appeals issued on November 17, 1950. The President, on November 30, 1950, wrote the Secretary of Commerce as follows (R. 24):

> As you know, the United States claims outright ownership of this stock. Impairment of the Government's title to this stock would seriously affect the public interest.
>
> The Supreme Court, which has expressed no opinion on the merits of Dollar's claim, has specifically said that the judgment in this case is not binding on the United States.
>
> Accordingly, you are directed to continue to hold this stock on behalf of the United States. All appropriate action should be taken to assert and maintain the Government's rights as owner of this stock.

In the district court, respondents filed a motion for entry of judgment and to call up for hearing the motion (in this Court) to substitute Charles Sawyer, Secretary of Commerce (Tr. 2141; Supp. R. 7). After argument, and special appearance by the Secretary of Commerce (Tr. 2152; Supp.

R. —), the district court, on December 11, 1950, entered final judgment as follows (Tr. 2218):

> 1. That in conformance with and obedience to the said mandate of the Court of Appeals the judgment of this Court of the 2nd day of December 1948 is hereby vacated.
>
> 2. That under the provisions of Rule 70 FRCP, which specifies "If real or *personal* property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law," that title to the shares in question is in the plaintiffs, since they were never legally divested of the same, and the asserted title of all others arising out of the same transaction to the contrary null and void, and that they are entitled to the delivery and possession of said shares, and entitled further as provided by said Rule if such may be necessary, "... to a writ of execution or assistance upon application to the clerk."

Both the United States and the Secretary of Commerce appeared specially and moved to vacate the judgment (Tr. 2220, 2222; Supp. R. —). The District Court denied the motions on December 15, 1950 (Tr. 2225; Supp. R. —). The United States, the Secretary of Commerce, and the parties defendant that same day noted appeals and applied for a stay pending appeal (Tr. 2226-9; Supp. R. —). The stay was granted December 18, 1950 (Tr. 2247; Supp. R. —).

Respondents on December 26, 1950, moved the court of appeals to dismiss the appeals. The court of appeals on January 31, 1951, by *per curiam* opinion (amended on February 8, 1951) (R. 42-46, 47): (a) dismissed the appeals of the United States and the Secretary of Commerce; (b) ruled that "Obedience to the order about to be entered pursuant to this opinion is, therefore, enforceable against [the Secretary of Commerce], and he is liable, under Rule 71, supra, to the same process for enforcing obedience to that order as if he were a party." (R. 45); and (c) directed that the second paragraph of the judgment be amended to read (R. 44):

> 2. That plaintiffs are entitled to possession of the shares as against defendants, and the defendants are ordered and directed to deliver forthwith to the plaintiffs the said shares. The possession to which plaintiffs are entitled is an effective possession of the shares. In so far as such right requires action on the part of defendants in addition to physical delivery of the certificates, such action is hereby directed to be taken. Plaintiffs are entitled under this judgment to all rights belonging to possessors of the shares. Plaintiffs are further entitled, as provided by Rule 70 of the Federal Rules of Civil Procedure, "to a writ of execution or assistance upon application to the clerk" of this court, if such writ becomes necessary.

The court of appeals also said that on the prior

appeal "it was here held that (1) the Commission had no power to acquire outright ownership of the stock" (R. 43). In fact, it had held on the prior appeal that "we do not decide that question, because we do not reach it" (R. in No. 353, at 2147).[4]

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In ordering the defendants to deliver the shares forthwith and to take action, in addition to physical delivery, necessary to give "effective possession," and holding that respondents are entitled "to all rights belonging to possessors of the shares," thus, in effect, holding that in an action against Government officials as personal tort feasors the courts have jurisdiction to oust the United States of its possession of property held under a claim of ownership which has not been adjudicated, and to impair the rights of the United States in and to such property.

2. In holding that a judgment for possession of the property against Government officials out of office may be enforced against another Government official, not a party to the action, who acquired by operation of law custody of the property in his official capacity on behalf of the United States as owner.

3. In holding that a judgment for possession of

[4] At that stage of its opinion it considered that the Government's position "has strong basis" (R. in No. 352, at 2147); at a later stage, that a supporting argument for the same result "is elusive and indirect" (R. in No. 353, at 2156).

property may be entered against former Government officials who are now out of office and have no vestige of custody or control of the property.

4. In holding that the Secretary of Commerce, who appeared specially in the District Court without submitting to its jurisdiction, has no standing to appeal from a judgment adversely affecting his official interests and those of the United States.

5. In holding that Section 207 of the Merchant Marine Act of 1936 does not authorize the Government (acting formerly through the Maritime Commission, now through the Maritime Administration) to acquire outright title to stock in an operating steamship corporation.

REASONS FOR GRANTING THE WRITS

1. The court below, with some justice, considered it "paradoxical" that this litigation should be pursued upon the hypothesis that the United States had no interest in the property and yet lead to a judgment which, while it could not conclude the United States, would be effective against Government officials (R. 43). Its revised form of judgment shows an attempt to give respondents an effective judgment while yet taking nothing from the United States. In truth, it does not accomplish the latter objective, but serves only to confuse still further the law surrounding suits against the United States.[5]

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[5] Whether the judgment serves the former objective is not in issue here, but we may note that the American President

Although it struck out the provisions of the district court judgment purporting to adjudicate the title of the United States to the stock, the court below, in holding that the judgment for possession may be enforced by writ of assistance against the Secretary of Commerce, who was not a party, necessarily assumed jurisdiction to oust the United States of *its* possession of the stock under a claim of title. "For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained." *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688. In effect, the judgment would coerce the Secretary of Commerce, who has official custody on behalf of the United States, physically to remove the stock certificates from the Government safe in which they are now lodged (R. 382), hand them over to respondents, and, perhaps, even to endorse them in the name of the Maritime Commission. The rule of *United States* v. *Lee*, 106 U.S. 196, as applied by this Court's decision in the present case, does not go so far. The courts have jurisdiction to remove a

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Lines' by-laws provide that the corporation need not recognize any claim except by the holder of record (R. in No. 353, p. 1457; *Salt Dome Oil Corp.* v. *Schenck*, 41 A. 2d 583 (Sup.Ct. Del.)), and that if there be substantial conflicting claims of ownership the transfer agent is not required to register a transfer even upon the surrender of properly endorsed certificates of stock. See, *e.g.*, *Mackenzie* v. *Engelhard & Sons Co.*, 266 U.S. 131, 143; *Telegraph Co.* v. *Davenport*, 97 U.S. 369, 371-2.

defendant Government official from possession of disputed property or to enjoin him from taking action injurious to the plaintiff. *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U.S. 446, 452; *Belknap* v. *Schild*, 161 U.S. 10, 19; *Tindal* v. *Wesley*, 167 U.S. 204, 223-4; *Scranton* v. *Wheeler*, 179 U.S. 141, 152-3. But coercion of the Secretary of Commerce to take affirmative action to remove the property from the possession of the Government and transfer it to respondents is not sanctioned by any decision of this Court. The Secretary could take such action only as an official, not as a private individual, and the clearest sign that relief is being improperly awarded against the Government is that the agent who receives the court's directive can only comply in his official capacity. *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, at 689, 695, 698-9; *Wells* v. *Roper*, 246 U.S. 335, 337; *Great Northern Ins. Co.* v. *Read*, 322 U.S. 47, 50.

Furthermore the judgment, though not in terms adjudicating title, casts a direct cloud on the Government's title. The Maritime Administration obviously could not sell the stock, as has long been planned (see R. 30). There would be considerable doubt whether the Secretary of Commerce would be entitled to receive, and endorse into the Treasury, any subsequent dividends paid upon the stock. Respondents would undoubtedly assert the right to vote the stock. In short, it is plain that despite the court of appeals' *caveat* as to the Government's

title, the rights of the United States as owner of the stock have been seriously invaded by the judgment directed below.

These are not merely formal or technical matters. As the President's letter of November 30th (*supra*, p. 6) indicates, the United States continues to claim ownership. The President and Attorney General have concluded that their public responsibility would not, in the absence of review by this Court, permit them to acquiesce, so long as appropriate avenues are open, in the miscarriage of justice involved in the holding below that the stock transfer was merely a pledge. This is true not only because the disposition of a Government asset worth more than $8,000,000, is involved, but also because, in view of our critical international situation, it might well be disastrous to turn over even temporary control and management of this vital shipping link to the Orient to the very interests whose mismanagement of the line forced the Government to acquire the stock in the first place.

2. The judgment as directed by the court below would theoretically run only "against [the] defendants" (R. 44), who are the former members of the Maritime Commission. But the court also expressly holds that the judgment may be enforced against the Secretary of Commerce under Rule 71 of the Federal Rules of Civil Procedure (R. 45, 47). In so holding, it has improperly applied

Rule 71 in substantial conflict with the decisions of this and other federal courts.

The last clause of Rule 71 provides:

> when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

Under the Rule, the crucial inquiry is whether the judgment may be lawfully enforced against the Secretary, who is not a party. The court below holds that it may, on the ground that the vesting in the Secretary of the function of holding custody of the stock certificates constituted a violation of an order entered by the district court in 1947; that order directed that the defendants not dispose of the possession or custody of the stock without notice to respondents. This holding seems plainly erroneous. The Secretary of Commerce acquired custody purely through operation of law, the Presidential Reorganization Plan of 1950, not through any act of transfer by the former members of the Maritime Commission, and the 1947 order was obviously not directed at such a legislative change in custody.

Under established equity practice, reflected in Rule 65(d), the Court's judgment can reach only to parties, their employees and agents, and those who aid and abet a party to violate the injunction.[6]

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[6] See *Lamb* v. *Cramer*, 285 U.S. 217, and *In re Lennon*, 166 U.S. 548.

An injunction against a personal tort does not reach to successor officials. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U.S. 229, 234-235; see *United States* v. *Boutwell,* 17 Wall. 604, 608.[7] It does not reach to other officials, similarly situated but not joined. *Scott* v. *Donald,* 165 U.S. 107, 117; *Chase National Bank* v. *City of Norwalk,* 291 U.S. 431, 436-437. It does not reach to employees of a party after they have left his employ. *Alemite Mfg. Corp.* v. *Staff,* 42 F. 2d 832, 833 (C.A. 2); *Harvey* v. *Bettis,* 35 F. 2d 349, 350 (C.A. 9). Whether it reaches to a corporate successor depends upon the extent to which the successor is viewed as a true successor, or as a mask for, or the same person as, the party defendant. *Regal Knitwear Co.* v. *National Labor Relations Board,* 324 U.S. 9; *Walling* v. *Reuter Co.,* 321 U.S. 671. In short, as Judge Learned Hand said in the *Alemite* case, "the only occasion when a person not a party may be punished, is when he has helped to bring about * * * an act of a party." The decision below can be squared with none of those cases.

3. The court of appeals ordered the defendants, the former members of the Maritime Commission, "to deliver forthwith to the plaintiffs the said shares" and directed them to take such further action, in addition to physical delivery of the cer-

[7] See also, *Swetland* v. *Curtiss Airports Corp.,* 14 FRS 65d.23 (N.D. Ohio), holding that an injunction against a private landowner does not bind the county which acquires by eminent domain.

tificates, as might be necessary to give plaintiffs "an effective possession of the shares." But all of the defendants have been out of public office since May 24, 1950, and their positions were abolished on that date by Reorganization Plan No. 21 of 1950.[8] The defendants therefore no longer have any custody of or control over the stock certificates and cannot possibly obey the judgment. See *United States* v. *Hamburg-American Co.*, 239 U.S. 466, 475-7; *Mills* v. *Green*, 159 U.S. 651, 653-4; *Oriel* v. *Russell*, 278 U.S. 358, 363; *McMurtrey* v. *Clark*, 157 F. 2d 703 (C.A. D.C.).

In the light of this fact, and the fact that respondents have never sought to join the Secretary of Commerce as a party, it appears that the action cannot be maintained because of the absence of a defendant against whom the judgment may operate. See *Snyder* v. *Buck*, 340 U.S. 15.

4. The court below dismissed the appeals of the United States and the Secretary of Commerce because they, in their special appearances in the district court, declined to submit themselves to that court's jurisdiction.[9] The anomalous result

[8] Some defendants had left office even previous to that date either by resignation or expiration of term of office (R. 56, 257).

[9] Of course, the Attorney General has no authority to submit the United States, or the Secretary of Commerce in his official capacity, to the court's jurisdiction. *United States* v. *United States Fidelity and Guaranty Co.*, 309 U.S. 506; *United States* v. *Shaw*, 309 U.S. 495; *Minnesota* v. *United States*, 305 U.S. 382; *Munro* v. *United States*, 303 U.S. 36; *Stanley* v. *Schwalby*, 162 U.S. 255.

is that parties who appear specially to assert a court's lack of jurisdiction to effect their interests in property are deprived of their right to correct by appellate review a judgment beyond the district court's jurisdiction. As a general rule none but a party to the action can take an appeal. See, e.g., *Ex parte Leaf Tobacco Board of Trade,* 222 U.S. 578; *Guion* v. *Liverpool, London, & Globe Insurance Co.,* 109 U.S. 173. But it is equally plain that one who appears specially to object to the court's jurisdiction over him does not have to submit to that jurisdiction in order to appeal an adverse decision. *Hassler* v. *Shaw,* 271 U.S. 195; *Davis* v. *O'Hara,* 266 U.S. 314.

The Secretary of Commerce has no connection with this litigation except by virtue of his official position and the effect of Reorganization Plan No. 21 of 1950. He insists that his custody is on behalf of the United States. His special appearance was as an official of the United States. The Government itself may appeal on the foundation of a special appearance. *United States* v. *Minnesota,* 95 F. 2d 468, 469 (C.A. 8), affirmed, 305 U.S. 382, 384; *Missouri* v. *Fiske,* 290 U.S. 18, 21, 25; *Stanley* v. *Schwalby,* 162 U.S. 255, 264, 265, 266, 270; *The Exchange,* 7 Cranch 116, 118, 120, 147.[10] So, we should

[10] *South Carolina* v. *Wesley,* 155 U.S. 542, denied an appeal based upon a mere "suggestion." If the language reaches to a special appearance, it has been restricted by the later decisions cited above. *United States* v. *Seigel,* 168 F. 2d 143 (C.A. D.C.), cited by the court below (R. 44), was a case where the

suppose, may the Government official who is interested only in his official capacity and who is threatened with enforcement of a judgment entered against others.

5. When this case was before this Court on our previous petition for certiorari (No. 353, this Term), the court of appeals had explicitly held that it did not decide whether Section 207 of the Merchant Marine Act of 1936 (49 Stat. 1988, 52 Stat. 954, 46 U.S.C. 1117) (*infra,* p. 21) authorized the Maritime Commission to acquire title to the stock (R. in No. 353, at 2147). Now, the court of appeals contradicts its own former opinion and states, "it was here held that (1) the Commission had no power to acquire outright ownership of the stock * * *" (R. 43). We suggest that if an administrative agency is to be held to have been in error in construing its basic statute over a 15 year period, it should at the least have a decision on that issue rather than a mistaken and enigmatic reading of a prior decision.

The Maritime Administration (as was its predecessor, the Maritime Commission) is authorized to "enter into such contracts, upon behalf of the United States * * * as may, in its discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve

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United States failed to substitute a successor within the time allowed by Rule 25(d) or to make any form of appearance, and simply filed an appeal from the dismissal of an action brought by its former official.

the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter."

The conclusion that this broad statutory grant of authority does not extend to the acceptance of property in compromise of a debt (here the suretyship liability of two of respondents), or to protect the security for Dollar of Delaware's debts to the Government by eliminating management which was considered to be the prime cause of the debtor's inability to meet its obligations, is of considerable importance to the administration of the Merchant Marine Act. The court of appeals' conclusion seems clearly erroneous in light of the fact that Congress intended the Maritime Commission, as in the case of the former Shipping Board, to have all the powers of a business corporation, including the power to settle claims and to protect its accounts. *United States ex rel. Skinner & Eddy Corp.* v. *McCarl,* 275 U.S. 1, 5; *Standard Oil Co. of California* v. *United States,* 59 F. Supp. 100, 106 (S.D. Cal.), affirmed, 156 F. 2d 312 (C.A. 9); H. Rep. 2168, 75th Cong., 3d sess., p. 17-8; S. Rep. 1618, 75th Cong., 3d sess., p. 5.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

FEBRUARY, 1951.

APPENDIX

1. Section 207, Merchant Marine Act of 1936 (Act of June 29, 1936, 49 Stat. 1988, as amended by Act of June 23, 1938, 52 Stat. 954, 46 U.S.C. 1117):

> The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. All the Commission's financial transactions shall be audited in the General Accounting Office according to approved commercial practice as provided in the Act of March 20, 1922 (42 Stat. 444): *Provided,* That it shall be recognized that, because of the business activities authorized by this Act, the accounting officers shall allow credit for all expenditures shown to be necessary because of the nature of such authorized activities, notwithstanling any existing statutory provision to the contrary. The Comptroller General shall report annually or oftener to Congress any departure by the Commission from the provisions of this Act.

2. Rule 65(d) F.R.C.P.

> FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in

terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

3. Rule 70 F.R.C.P.

JUDGMENT FOR SPECIFIC ACTS; VESTING TITLE. If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

4. Rule 71 F.R.C.P.

PROCESS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES. When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 552

EMORY S. LAND, EDWARD MACAULEY, JOHN M. CARMODY, RAYMOND S. McKEOUGH, WILLIAM W. SMITH, RICHARD PARKHURST, GRENVILLE MELLEN and J. K. CARSON, JR.,

Petitioners,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR CO., and H. M. LORBER.

CHARLES SAWYER,

Petitioner,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR CO., and H. M. LORBER.

Brief of Respondents in Opposition to Petition for Writs of Certiorari

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Brief of Respondents in Opposition to Petition for Writs of Certiorari

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals on the decision sought to be reviewed (R. 41) is too recent (January 31, 1951) to be yet reported. The District Court rendered no opinion in connection with this phase of the case, except a memorandum opinion on stay of execution (Tr. 2246)*; this has not been reported.

*"Tr. ...." refers to the original record of the District Court and the Court of Appeals on file in the office of the Clerk of this Court.

Opinions at earlier stages of the litigation are *Dollar v. Land,* 154 F.2d 307, 81 U.S. App. D.C. 28 (1946); *Land v. Dollar,* 330 U.S. 731 (1947); *Dollar v. Land,* 82 F. Supp. 919 (1948), and *Dollar v. Land,* 184 F.2d 245, 87 U.S. App. D.C. ....., cer. den. 340 U.S. 884 (1950).

QUESTION PRESENTED

No substantial question is presented. The petition merely seeks, for a second time, to have this Court overrule its decision that this is not a suit against the United States. *Land v. Dollar,* 330 U.S. 731.*

Only one question is really reflected in the petition's discussion:

It is elementary that where a person is sued for possession of property, he may not escape judgment by making a transfer during the pendency of the suit, and his transferee is bound by the judgment.

Is the rule any different in a case brought against individuals under the doctrine of *United States v. Lee,* 106 U.S. 196, and *Land v. Dollar,* 330 U.S. 731?

In other words, although defendants cannot stay a determination of the case or bar recovery by a plaintiff by the assertion that they hold as public officials, does the transferee immunize himself from the judgment by repeating the identical assertion that he is a public official and holds custody in that capacity? This is a mere variant of the question decided in *Land v. Dollar,* supra.

The petition purports to present two other questions, (a) whether the Secretary of Commerce has standing to appeal, and (b) whether Section 207 of the Merchant Marine Act of 1936 authorized the Maritime Commission to acquire title to the stock. Neither question is presented, as we show in part III of the Discussion, below.

STATEMENT

This is a suit brought in 1945 by respondents against certain individuals who were members of the United States Maritime

*The first time was in No. 353, Oct. Term, 1950.

Commission. It involves the right to possession of stock of American President Lines, Ltd.

This is the third time the case has been here on petition for certiorari. It was first here in *Land v. Dollar,* 330 U.S. 731 (April 1947). The Court held that, if it should be determined that a certain 1938 contract was a pledge, plaintiffs were entitled to possession and that they should have judgment accordingly.

Remanded to the District Court, the case was tried, appealed to the Court of Appeals, and on July 17, 1950, that court held that the 1938 contract was a pledge. It therefore adjudged, as it was bound to do under this Court's decision of April 1947, that plaintiffs were entitled to possession.

October 11, 1950 petitioners (the defendants) petitioned this Court for certiorari. November 13, 1950 the petition was denied, *Land v. Dollar,* 340 U.S. 884.

November 17, 1950 the mandate was filed in the District Court, commanding it to enter judgment for plaintiffs in accordance with the opinion of the Court of Appeals (Tr. 2136), and plaintiffs moved for entry of judgment on the mandate (Tr. 2141).

The Attorney General opposed the motion in the name of the defendants (Tr. 2146) and also in the name of Mr. Charles Sawyer as Secretary of Commerce, on whose behalf he filed a so-called "special appearance" (Tr. 2152). Despite the fact that the case was before the District Court on the mandate to enter judgment for plaintiffs, the Attorney General actually requested a judgment of dismissal (Tr. 2154).

December 11, 1950 the District Court entered judgment for plaintiffs on the mandate, in a form prepared by the court itself (Tr. 2218). The next day the Attorney General moved to vacate the judgment, purporting to do so by "special appearances" in the names of Mr. Sawyer and the "United States." These motions were denied (Tr. 2220, 2222).

December 15, 1950 the Attorney General filed three notices of appeal from the judgment, one in the name of the defendants (Tr. 2228), one in the name of the United States (Tr. 2226), and

one in the name of Mr. Sawyer (Tr. 2227), the last two again purporting to be upon "special appearances." In the name of the "United States" alone he applied for an order staying execution of the judgment pending appeal (Tr. 2229). The District Court granted the stay (Tr. 2246) but stated in an accompanying opinion that it saw no merit in appellants' position and granted the stay only out of deference to its understanding of a general policy on such matters expressed by the Court of Appeals (Tr. 2246).*

As soon as the record was docketed in the Court of Appeals, plaintiffs (respondents) moved to dismiss the three appeals as frivolous and without substance (R. 1).

January 31, 1951 the court below dismissed the appeals of Mr. Sawyer and the United States and on defendants' appeal ordered the cause remanded to the District Court with directions to enter judgment in this form (R. 44):

> "That plaintiffs are entitled to possession of the shares as against defendants,† and the defendants are ordered and directed to deliver forthwith to the plaintiffs the said shares. The possession to which plaintiffs are entitled is an effective possession of the shares. In so far as such right requires action on the part of defendants in addition to physical delivery of the certificates, such action is hereby directed to be taken. Plaintiffs are entitled under this judgment to all rights belonging to possessors of the shares. Plaintiffs are further entitled, as provided by Rule 70 of the Federal Rules of Civil Procedure, 'to a writ of execution or assistance upon application to the clerk' of this court, if such writ becomes necessary."

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*The opinion reads:

"I am of the opinion that there is no merit in the Government's motion and that of the Secretary of Commerce and ordinarily under the circumstances I would deny the application to stay the order on mandate and final judgment pending appeal, but the Court of Appeals has indicated and, at the Judicial Conference of this Circuit held last June, it was suggested that in matters of this kind a stay be issued. Acquiescing in that suggestion, the Court orders a stay as I have indicated to counsel on both sides I would do and pending the resolution of the matter by the Court of Appeals have signed an order to that effect."

†The judgment here contains the names of plaintiffs and the number of shares to which they are entitled.

February 5, 1951 all the appellants applied to the court below for a stay of its mandate pending application to this Court for a writ of certiorari. Appellees opposed the motion on the ground that any petition for certiorari could only be frivolous and dilatory. The motion was denied.

The United States has not filed a petition for certiorari to review the decision of January 31, 1951, but on February 13th defendants and Charles Sawyer did so, and also applied to the Chief Justice for a stay of the mandate. February 15, 1951 the Chief Justice stayed the mandate until further order of the court.*

Changes in Public Office Occupied by Defendants, and Stipulation and Order Enjoining Transfer of Custody of the Shares Pendente Lite.

The present petition for certiorari revolves around the fact that defendants no longer occupy public office. This is quite irrelevant, but as it is the basis of the petition, we briefly state the facts.

Between the commencement of this case in 1945 and the time it reached this Court in 1946, some of the defendants had ceased to be Maritime Commissioners. Consequently, when the Solicitor General petitioned this Court for certiorari the first time (Oct. Term, 1946, No. 207), he moved to substitute the new in place of the former members of the Commission as parties to the case. Plaintiffs consented to addition but objected to substitution, and the Court added the new members but did not substitute. When it later decided the case, it vacated its order so that the District Court could pass on the motion. *Land v. Dollar,* 330 U.S. 731, 739.

After remand in 1947, plaintiffs called up the motion for hearing. By order of the District Court, on stipulation, the new mem-

*The defendants could not have obtained a stay of execution from the District Court without filing a supersedeas bond under R.C.P. Rule 62(d). They filed no such bond, but their attorney, in the name of the "United States," obtained a stay without bond, while disavowing that the "United States" was a party. The appeal of the United States has since been dismissed, and no review of that dismissal has been sought. Yet the stay has now been continued in effect on application of the other appellants.

bers were "added as and made parties defendant herein in addition to and not by way of substitution for any other defendant" (O.R. 51).* The case then proceeded against both old and new defendants.

On June 10, 1947 the parties entered into the following stipulation, and an order of the court was entered upon it (O.R. 53):

> "It is hereby stipulated and agreed by and between the parties hereto that until the final determination of this case, the defendants will not, nor will any of them, either directly or through any agents, assistants, deputies, or employees sell, transfer, or otherwise dispose of the possession or custody of any of the shares of stock which are the subject matter of this suit or of any of the certificates representing said shares of stock unless prior thereto they shall have given to the plaintiffs at least twenty days notice in writing of their intention to do so, so that plaintiffs may have an opportunity to apply to the Court for a restraining order or an injunction pendente lite or both; but defendants shall not be deemed by this stipulation to have consented to the entry of such an order or injunction. By so stipulating, the defendants shall not be deemed to have represented that they or any of them had or now have possession or custody of any of the certificates of stock which are the subject matter of this suit or any power or authority to sell, transfer, or otherwise dispose of said certificates.
>
> [Date and signatures here omitted]
>
> So Ordered:
> JAMES M. PROCTOR, Justice, 6/11/47."

This stipulation was executed on behalf of defendants by Peyton Ford, as Assistant Attorney General.

On May 24, 1950, after the case had been tried, appealed to the Court of Appeals and argued, and while it was under submission awaiting decision, Reorganization Plan No. 21 of 1950 (15 F.R. 3178) went into effect. That Plan abolished the Mari-

*The record in No. 353 (the petition for certiorari denied on November 13, 1950) is by stipulation (R. 49) part of the record here. We refer to it by the symbol "O.R. ...." (for "old record").

time Commission and redistributed its functions to the Department of Commerce.

Counsel for respondents immediately, on May 31, 1950, wrote to the Secretary of Commerce, calling attention to the stipulation and order of June 11, 1947, inquiring whether any attempt would be made to transfer custody of the stock to him or to any subordinate, and advising that if custody should be transferred, "any custody so obtained by you will be subject to the foregoing order and to the ultimate judgment of the court." The Secretary of Commerce acknowledged the letter,* and copies of the correspondence were sent to the Attorney General and acknowledged, but neither the Secretary of Commerce nor the Attorney General advised whether possession of the stock had been or was going to be handed over to Mr. Sawyer.

In due course the Court of Appeals decided the case, and the Solicitor General petitioned this Court for certiorari (Oct. Term, 1950, No. 353). In his petition and by an accompanying motion he advised this Court of the abolition of the Maritime Commission, represented that the stock certificates had passed into Mr. Sawyer's possession, and moved for substitution of Mr. Sawyer as a party in place of the defendants.

Concurrently with their brief in opposition to the petition, respondents filed "Respondents' Memorandum Relative to Petitioners' Motion to Substitute." We there suggested that the Court should not pass on the motion but should let it go to the District Court, on remand of the case, just as it had done with the similar motion of 1946 (see p. 5, supra). We further submitted that it would then be proper to add Mr. Sawyer's name to the record as a defendant, but that it would not be necessary to do so, since Mr. Sawyer, by taking possession from defendants during pendency of the suit to determine the right to possession, and after the order of June 11, 1947, had subjected himself to the final judgment whether his name was so added or not. And

*Copies of this correspondence were attached to "Respondents' Memorandum Relative to Petitioners' Motion to Substitute" in *Land v. Dollar*, Oct. Term, 1950, No. 353.

respondents further submitted that while Mr. Sawyer could be added as a defendant and would be bound by the judgment though not added, he should not be substituted for the defendants, who should remain bound.

When it denied certiorari, this Court did not pass upon the motion to substitute.

DISCUSSION

There are two groups of petitioners, (1) the defendants, former members of the Maritime Commission, and (2) Mr. Charles Sawyer.*

The determination that the stock belongs to plaintiffs and that they are entitled to recover possession is not presented for review. Those questions were settled by decision of the court below on July 17, 1950, with respect to which this Court denied certiorari November 13, 1950. The case is now here after entry of judgment intended to effectuate that decision.

The only question to properly come before the court now with respect to the defendants is whether the judgment conforms to the decision of last July. The only question that Mr. Sawyer can possibly have any standing to present is whether the judgment is enforceable against him.

Self-evidently, objection by defendants to the judgment is frivolous. This Court held in this very case that, if the 1938 contract should be found to be a pledge, plaintiffs would be entitled to a judgment against defendants for possession, *Land v. Dollar,* 330 U.S. 731. Later the court below found that the contract *was* a pledge, and it therefore held that plaintiffs were entitled to a judgment against defendants for possession. The judgment entered against defendants is exactly of that nature (see p. 4, supra).

No fact has occurred to alter the situation. Petitioner-defendants say that they have ceased to occupy public office, no longer have custody of the shares and have passed custody over to Mr. Sawyer.

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*Although the United States was an appellant below, it is not a petitioner here.

But when the case went to trial in 1947, many of the defendants had already ceased to occupy public office (see pp. 5, 6, supra).

And all the facts were before this Court when it denied the petition for certiorari in No. 353 on November 13, 1950. They were placed before the Court by motion of the Solicitor General to substitute Mr. Sawyer for defendants (see p. 7, supra). But there was no suggestion then that a judgment against defendants was therefore improper or that it could not be enforced against Mr. Sawyer. On the contrary, Mr. Sawyer was asking to be made a defendant so that he would be bound by the judgment, as a party of record.

Following the denial of certiorari in No. 353, the Solicitor General announced that there was no basis for requesting a rehearing.* Yet the facts on which the present petition rests were then in existence. The simple truth is that the present petition is in reality a belated petition for rehearing on the contention that this is a suit against the United States, although petitioners avoid so stating it.

With these preliminary remarks we address ourselves directly to the petitioners' assertions and arguments.

I. A PERSON SUED FOR POSSESSION OF PROPERTY MAY NOT ESCAPE JUDGMENT BY MAKING A TRANSFER DURING PENDENCY OF THE SUIT, AND THE JUDGMENT IS ENFORCEABLE AGAINST THE TRANSFEREE.

The fact that petitioner-defendants have ceased to occupy public office is quite irrelevant, because they were never sued as public officials. They were sued as private individuals illegally withholding possession. The very heart and core of this Court's decision in *Land v. Dollar,* supra, is that they could be and were so sued.

The fact that defendants have passed custody of the shares over to Mr. Sawyer is equally irrelevant. A defendant who is sued for

*See our brief in No. 353 filed February 23, 1951 in opposition to motion for leave to file a petition for rehearing.

possession which he illegally withholds from a plaintiff cannot escape a judgment for return of possession by parting with custody during the pendency of the very suit brought to adjudicate the right to possession. Otherwise the defendant wrongdoer could flout the law in every case.

It is elementary that a transfer of property during the pendency of a suit to recover it does not abate the suit, and the judgment is enforceable against the transferee. The latter's possession is deemed that of the former. A writ of possession, of execution, or of assistance—whatever it may be called—will reach the property in the custody or possession of the transferee. All who come into possession during the litigation must go out. *Lacassagne v. Chapuis,* 144 U.S. 119 at 125; *Ex Parte Railroad Co.,* 95 U.S. 221 at 226; *Wetherbee v. Dunn.* 36 Cal. 147; *New Jersey National Bank & Trust Company v. Berkshire,* 156 A. 40, 9 N.J.M. 933; 34 *Am. Jur.* 363, Section 2; page 375, Section 17. As said in *Lamb v. Cramer,* 285 U.S. 217, so far as one acquires *pendente lite,* "any interest in the property involved in the suit, he was not only subject to those equities, but bound by any decree which the court might make with respect to it, to the extent that it might adjudicate the rights of the plaintiffs against the defendants" (p. 219), and the transferee may be reached by appropriate proceedings "to aid in giving to the plaintiffs the property which, as against the defendants in the principal suit, they were entitled to receive" (p. 221). And see *Root v. Woolworth,* 150 U.S. 401.

In short, the very pendency of the suit to determine the right to possession was sufficient to protect plaintiff against interim transfers. That principle is elementary, *and the petition cites no cases bearing on the subject.**

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*R.C.P. Rule 71 provides that "when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party." This rule is derived from old equity Rule 11, and, as said in 3 *Moore's Federal Practice* (1st ed.), p. 3377, "The reason for Rule 71 is the obvious one of making all orders fully enforcible in favor of and against all persons who are properly affected thereby even though not parties to the action." Petitioners protest that Rule 71 does not state when a judgment may be law-

Effect of the Stipulation and Order of June 11, 1947.

To make doubly sure, plaintiffs sought and obtained the stipulation and order of June 11, 1947, to the effect that the defendants would not part with custody or possession of the shares during the litigation (see p. 6, supra). The purpose of the stipulation and order was to protect the jurisdiction of the courts to make their ultimate judgment effective and to prevent frustration of the object of the litigation by interim transfers of the custody, based on changes of membership in the Commission or any other cause. Plaintiffs proceeded with the suit in reliance on the word of the Attorney General, the stipulation of the parties, and the order of the court that the property would not be placed beyond reach of the judgment. Otherwise, they would have asked that the stock be placed in the hands of a receiver or deposited physically in court, to abide its judgment. The stipulation and order placed the stock *in gremio legis,* as fully as if physically deposited. The continued retention of custody by defendants was the custody of the court, and whoever obtained custody after defendants holds it for the court.

The order of the court bound the defendants, it bound Mr. Sawyer, who knew of it, and it is enforceable against him. *In re Lennon,* 166 U.S. 548; *Walling v. Reuter Co.,* 321 U.S. 671; *Rivera v. Lawton,* 35 F.2d 823 (1 Cir.). What is involved is the integrity of a stipulation entered in the name of the Attorney General and the integrity of court orders made to protect their jurisdiction in a pending case.

The cases cited in the petition simply have nothing to do with this kind of situation.*

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fully enforced against one not a party. But it is a recognition of the principle that a judgment may in a proper case be so enforced, and perhaps the most elementary application of that principle is the case of transfer of property in midstream of a suit which has been brought to determine the right to possession.

**Chase National Bank v. City of Norwalk,* 291 U.S. 431, 436, 437, recognizes that an injunction will reach persons identified with a defendant and privy to his contempt. One who knowingly receives custody of a specific object from one enjoined from transferring that custody falls into that

II. THE TRANSFEREE CANNOT ESCAPE THE JUDGMENT BY ASSERTING THAT HE HOLDS AS A PUBLIC OFFICIAL ANY MORE THAN THOSE WHO HAD CUSTODY BEFORE HIM.

Petitioners do not really question the foregoing elementary principles, nor deny their application in a suit between private parties. Rather they seek to evade them by arguing, once again, that the "United States" has title, and that this is not a suit against private individuals.

This is the identical assertion made by the defendants at the outset of the case. They claimed that the United States had title, and they also claimed that this assertion prevented the courts from hearing the cause, determining that the claim of title in the United States was unfounded, and giving judgment for plaintiffs. This Court rejected the contention. *Land v. Dollar,* 330 U.S. 731. The assertion can have no greater effect, now, when repeated by Mr. Sawyer, than it originally had, when made by defendants.

If the Maritime Commission had been abolished and its functions transferred to the Department of Commerce before this suit was commenced in 1945, plaintiffs would have sued the occupant of the office of Secretary of Commerce. If those events had occurred after the suit was instituted but before trial, the occupant of that office would have been added as defendant just as new members of the Maritime Commission were added in 1947 (see pp. 5, 6, supra). In either event no one would think of contending that the rule which this Court has applied to the defendant members of the Maritime Commission would not apply to the Secretary of Commerce. The fortuitous circumstance that the abolition of the Commission occurred while the case was on appeal is irrelevant. The suit began as one against individuals, it always continued to be, and it still is, and the elementary principle about

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category. In *Scott v. Donald,* 165 U.S. 107, suit was brought to enjoin certain constables from making seizures of liquor under an improper law. The fact that other constables not sued might seize other liquor was no reason to apply the injunction to them since they were not parties. There was, of course, no connection between them and defendants.

enforceability of a judgment against a transferee of property *pendente lite* applies.

The essential characteristic of the petitioners' discussion of the subject is that it constantly phrases the issue in a question-begging manner that simply ignores *Land v. Dollar,* supra. For example, in their question No. 1, they ask whether the judgment may be enforced "against a Government official who holds the stock solely as agent for the United States * * * and pursuant to the United States' claim of title." In their specification of error No. 1 they assert that enforcement of the judgment by a writ of assistance against the stock in Mr. Sawyer's custody would "oust the United States of its possession." In specification of error No. 2 they assert that Mr. Sawyer "acquired by operation of law custody of the property in his official capacity on behalf of the United States as owner." These statements are embroidered in their discussion. Thus they say that the judgment will coerce the Secretary of Commerce, "who has official custody on behalf of the United States" "to take affirmative action to remove the property from the possession of the Government," and the like.

But Mr. Sawyer does not have "official custody" on behalf of the United States any more than did the defendants, from whom he acquired custody. Nor is the property in his hands any more in the possession of the government than it was while in theirs. Once it was judicially determined that the 1938 contract was a pledge, it followed that the property is not in the possession of the government at all and has not been since the discharge of the debt secured by the pledge. That is precisely the holding of *Land v. Dollar,* supra.

The arguments and assertions now made by petitioners are the same as those made by them in their brief in this Court in No. 207, Oct. Term, 1946, which culminated in *Land v. Dollar,* supra. In a footnote we quote passages from that brief.* This Court rejected them as unsound then, and they are unsound still.

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*In their brief (in No. 207, Oct. Term, 1946) petitioners phrased the question thus (p. 3):

> "Whether a suit brought against Government officers to obtain possession of stock held by such officers under a claim of absolute

The petition asserts that "official custody" of the stock came to Mr. Sawyer by operation of law under Reorganization Plan 21 of 1950. This but repeats the question-begging. The Plan transferred to the Secretary of Commerce only the "property of the United States Maritime Commission."* The shares here involved would not pass to the Department of Commerce *under the Plan* unless they were the property of the Commission. But they were not. That is precisely the fact which has been judicially determined in this case. In *Land v. Dollar,* supra, this Court held that the courts

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ownership by the United States with documentary legal title in the United States, on the ground that such stock had been pledged to secure an indebtedness now satisfied, is a suit against the United States."

In that brief petitioners argued (p. 41):

"Any action aimed at giving respondents the requested relief would thus necessarily involve the exercise by these petitioners of the official authority of their position. Hence the suit can be effective only to the extent that it seeks to control petitioners' actions and functions as members of the Maritime Commission."

They also argued that certain defendants, being no longer in office, could not respond to a judgment (Br. 39):

"That this proceeding is only nominally directed against petitioners as private individuals can be conclusively shown by the fact that the relief sought cannot be obtained through any judgment against Admiral Land and the other petitioners who are no longer connected with the Commission. Admiral Land's sole activities in regard to the stock—the taking of possession and title, the custody and refusal to return to respondents—has been in his official capacity as member of the Commission. Admiral Land is not now in a position either actually to sell the stock himself, or to prevent any officials on the Commission from so disposing of the stock, nor is he able either himself to return the stock or order its return to respondents. Thus any judgment against Admiral Land would be ineffective to secure the relief sought by respondents."

In the instant petition citation of cases such as *United States v. Boutwell,* 17 Wall. 604, involve the same fundamental error of assuming that defendants were sued in an official capacity to compel performance of an act which can only be performed as officials.

*Section 305 of the Plan provides:

"There are hereby transferred to the Department of Commerce, to be used, employed, and expended in connection with the functions transferred by the provisions of this reorganization plan, all of the records, property, personnel, and unexpended balances of appropriations, allocations, and other funds (available or to be made available) of the United States Maritime Commission."

had jurisdiction to determine the fact, and that, if it were decided in favor of plaintiffs, the courts had jurisdiction to give judgment that plaintiffs have possession. Jurisdiction to give judgment comprises jurisdiction to enforce the judgment. And because the shares were not the property of the Commission, Mr. Sawyer has merely taken custody as an individual and holds it wrongfully, just as did the individuals from whom he obtained it. He cannot relitigate the question judicially determined against the individuals from whom the property came to him. *Root v. Woolworth,* 150 U.S. 401, 411.

On reflection it will be seen that petitioners' contention is nothing less than the claim that, during the pendency of an action brought to determine the issue of fact, Mr. Sawyer acquired the power to oust the courts, arrogate to himself the jurisdiction to decide the fact, and veto all further proceedings by the judicial branch of the government.

Finally, the petition makes the same old assertion in what is doubtless thought to be more striking dress. It states that on November 30, 1950—17 days after this Court had refused to review a decision of the Court of Appeals that the plaintiffs owned the stock and were entitled to possession—the President wrote the Secretary of Commerce a letter, asserting that the Government has title and directing him to hold the stock. But in 1946, this Court decided that the jurisdiction to decide that issue was in the courts, not in the executive branch of the Government. *Land v. Dollar,* supra.

Assertion by the President of title in the United States has no greater effect than the same assertion when made by members of the Maritime Commission. The following words in *United States v. Lee,* 106 U.S. 196, could have been written for the occasion:

> "It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop, here, I hold

by order of the President, and the progress of justice must be stayed." (p. 221)

"Shall it be said * * * that the courts cannot give a remedy when the citizen has been deprived of his property * * * because the President has ordered it and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights." (pp. 220, 221)

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." (p. 220)

This case is indistinguishable from *United States v. Lee,* supra. There plaintiffs recovered judgment for possession of land which was being used partly as an army post and partly as Arlington Cemetery. No one there had the temerity to say that the officer in charge could be replaced and that thereby plaintiffs could be compelled to relitigate the case. Petitioners admit that the *Lee* case held that "the courts have jurisdiction to remove a defendant Government official from possession of disputed property." So also they may remove him from possession of personal property, or, what is the same thing, remove it from him.

In the *Lee* case, this Court said (p. 208):

"* * * The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right."

And in this case, *Land v. Dollar,* 330 U.S. 731, 738, this Court said that once it was established that the 1938 contract was a

pledge, "the dominant interest of the sovereign is then on the side of the victim," the plaintiffs, to recover their property.

The Alleged Rights of the United States Are a False Element in the Case.

Much is made in the petition about the alleged rights of the United States. Discussion about those supposed rights is a false element for several reasons. First, the United States has no rights. Second, there is nothing before the Court that raises any issue on the subject. Third, there is only one way in which a claim of the United States may be raised, and that is by a suit to quiet title brought by it as plaintiff in its own name against respondents. No other way is open. We shall devote a brief paragraph to each of these points.

When this case was first before this Court (No. 207, October Term, 1946), there might have been some excuse to talk about the title of the United States. But since then the issue has been tried, and it has been solemnly decided that the United States does not own the stock and that the plaintiffs do. While the suit was one for possession, it was necessary, in order to determine the right to possession, to determine the ownership, and the courts below had the jurisdiction to do so, as this Court held, *Land v. Dollar,* supra.* That determination is conclusive for this case and for all that flows from it.

But the petition protests that the determination is not *res judicata* as against the United States. Whether that is so is not a question now before the court. And whether true or not it is irrelevant. The statement that the decision is not *res judicata* against the United States means no more than this: if the United States should see fit to bring a suit in its own name against the

*The petition expostulates that the decision of the court below "clouds" the title of the United States. Doubtless a court decision that the plaintiffs and not the United States own the stock does make laughable continued assertion that the United States has title. That is no reason for setting aside the judgment. In *United States v. Lee,* supra, the judgment that the plaintiffs have possession clouded the title of the United States just as much as the judgment does in the present case.

present plaintiffs to quiet title, it would not be foreclosed on the threshold by the present judgment. Yet, as a practical matter, such a suit would be fruitless, for, after all, the issue *has* been tried. More than that: under the authority conferred by statute upon the Attorney General to take charge and control of any litigation wherein he believes that the interests of the United States are involved (*R. S.* Sections 359 and 367, 5 *U.S.C.* Sections 309, 316; *Booth v. Fletcher,* 101 F.2d 676, 69 App. D.C. 351), the Attorney General did take charge, and from first to last the case has been tried and conducted by him and those under his supervision. The trial was long, the record exhaustive. All possible evidence was introduced. It was almost entirely stipulated and documentary.

The admitted facts, which in all honesty would have to be conceded in any new action, would compel judgment for plaintiffs in a new suit as they have in the old. The institution of a new action by the Attorney General, this time in the name of the United States, would be, in the circumstances, an act of intransigeance and oppression, even if technically such a suit would not be barred by the doctrine of *res judicata.**

Under the doctrine of *United States v. Lee,* 106 U.S. 196, and *Land v. Dollar,* 330 U.S. 731, plaintiffs may proceed, and may

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*If the question of *res judicata* should arise in some proceeding, there are facts which occurred after the decision in *Land v. Dollar,* 330 U.S. 731, which would bear on the question, e.g., the Department of Justice tried and handled the case, a material fact under the principles stated in *Restatement of Judgments,* Section 84; *Minneapolis-Honeywell Regulator Co. v. Thermoco, Inc.,* 116 F.2d 845, 846 (2 Cir.); *Souffront v. La Compagnie Des Sucreries,* 217 U.S. 475, 487; *Hill v. Wallace,* 259 U.S. 44 at 62; *Gunter v. Atlantic Coast Line Railroad Co.,* 200 U.S. 273, 284, 287; *Sunshine Coal Co. v. Adkins,* 310 U.S. 381, 403. Moreover, the United States appeared in the District Court to vacate the judgment. That may have been an intervention to assert title of the United States. Interveners take the record and all determinations already made as they find them. *State of Kansas v. Occidental Life Insurance Co.,* 95 F.2d 935 at 936 (10 Cir.); *In re Read-York, Inc., United States v. Davies,* 152 F.2d 313 (7 Cir.); *Feldman Investment Co. v. Connecticut General Life Insurance Co.,* 78 F.2d 838 at 841 (10 Cir.); *Slocum v. Edwards,* 168 F.2d 627 at 631 (2 Cir.); *Davis v. Davis,* 305 U.S. 32 at 42; *Merchants Heat & Light Co. v. Clow & Sons,* 204 U.S. 286 at 290.

enforce their rights, against *all* natural persons, whoever they may be and whatever official title they may display, "however near to those in power,"* and *all* persons taking custody or possession after the defendants or cooperating with or under them or with or under their successors in possession are bound by the judgment rendered in this case and subject to its enforcement.

Claim of title in the United States cannot be raised by any kind or quantity of out-of-court statements, by extra-judicial threats and caveats, or by any assertions of any natural person in any proceeding to which the United States does not commit itself as an actor. Throughout this litigation the Department of Justice has wished to avoid committing the United States to the jurisdiction of the courts where it would be bound by the court's decree. Yet at the same time it has wished to intrude the United States into the case as an untouchable but ominous presence to veto any judgment in favor of the plaintiffs and to set at naught attempts at enforcement. We submit that this may not be done.

Students of the law have commented on "persistence * * * of the royal prerogative of dishonesty" and misguided efforts to extend it (Dean Pound, 28 Harv. Law Rev. 343, 345). *United States v. Lee,* supra, and *Land v. Dollar,* supra, would be but a meaningless and hollow collection of words if what we have just said about the effect and enforcement of the judgment were not true, and the "royal prerogative of dishonesty" would have conquered a new field where it never was before.

III. NO OTHER QUESTIONS ARE PRESENTED

The petition presents as question No. 3, whether the Secretary of Commerce has standing to appeal without submitting himself to the jurisdiction of the district court.

No such question is raised. Plaintiffs' motion to dismiss Mr. Sawyer's appeal was not made on the ground that he was without standing to appeal (see motion, R. 6), but on the ground that the judgment from which he appealed was obviously correct and

*Quoted from *United States v. Lee,* 106 U.S. 196; see p. 16, supra.

was enforceable against him, for the reasons discussed in the earlier pages of this brief. In disposing of Mr. Sawyer's appeal, the court below said that, if he had a right to appeal, it would still affirm the judgment as modified by it (R. 45).

Petitioners in their fifth specification of error and their fourth question assert that the court below held that Section 207 of the Merchant Marine Act does not authorize the government to acquire outright title to stock in an operating steamship corporation. There is no such holding; no such question is involved. In *Land v. Dollar,* 330 U.S. 731, this Court held that the plaintiffs would be entitled to judgment if the 1938 contract was a pledge, whether or not the Commission had power to acquire outright title. In its decision of July 1950 the court below found that the contract was a pledge. Consequently it said, "we do not decide that question [of the Commission's power to acquire outright title], because we do not reach it" (R. 2147). The present petition (No. 552) not only quotes this clear statement* but correctly says, "When this case was before this Court on our previous petition for certiorari (No. 353, this term), the Court of Appeals had explicitly held that it did not decide whether Section 207 of the Merchant Marine Act of 1936 * * * authorized the Maritime Commission to acquire title to the stock."†

In an effort to find some question for review, petitioners seize on the fact that, in its opinion of January 31, 1951, the Court of Appeals described or characterized its decision of last July as one where it had "held that (1) the Commission had no power to acquire outright ownership of the stock and (2) the plaintiffs were pledgors."

This is not even a statement that the Commission lacked power to acquire outright title to stock generally. It refers to *the* stock in *this* case; the Commission had no power to acquire outright title to that stock because the possession had been obtained under a pledge.

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*Last sentence in the petition's Statement.

†First sentence of part 5 of the petition's "Reasons for Granting the Writs."

If the quoted language should be construed as saying more, it is not the *decision* of any court in any case, for it merely purports to describe the reasoning by which the court reached its prior decision. It is patently not the decision of January 31, 1951, for that decision merely has to do with the form of judgment entered to effectuate plaintiffs' right to possession and with the enforceability of that judgment. Nor is it the decision of July 17, 1950, for what was then decided was that plaintiffs are entitled to a judgment for possession. The quoted statement is only a description of the reasoning of the earlier decision. All that petitioners really say is that it is a misdescription. Certainly the prior decision is correctly stated, whether its reasoning is or not. Certiorari is not granted to review comment on earlier decisions when the comment is no part of the decision rendered.

CONCLUSION

In the conclusion to our brief filed in October 1950 in opposition to the petition for certiorari in No. 353 we said:

> "The litigation is about to enter its sixth year. It is submitted that the time has come when, paraphrasing what this Court has said in this case * * *, the dominant interest of the sovereign is on the side of the victim who has brought this possessory action; instead of protracting the suit that interest should bring it to an end with a surrender of the property wrongfully withheld for so long."

That is now more true than ever. The litigation has been inexcusably protracted and delayed well into the sixth year.

We respectfully submit that the petition should be denied.

Dated: San Francisco, California, March 1, 1951.

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